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STATEMENT ON BEHALF OF TOBACCO INSTITUTE, INC.

In response to the Commission Notice of January 18, 1964, this statement of views is presented by The Tobacco Institute, Inc. of Washington, D. C.

The Institute is a voluntary association of fifteen United States manufacturers of tobacco products, including all manufacturers of cigarettes for general public sale. It has been authorized to present the views of its members, as set forth in this Statement, with respect to the proposed "Trade Regulation Rules" which are the subject of this hearing.

Subdivision (d) of Section 1.67 of the Commission's Procedures and Rules of Practice specifies that there will enter into the Commission's consideration of this proposal "all relevant matters of fact, law, policy and discretion."

In this Statement, we shall endeavor to deal with each of the points, respectfully to be advanced for Commission consideration, in terms of this four-fold reference of fact, law, policy and discretion.

Their sound application, we shall demonstrate, requires three conclusions:

First, that as a matter of law the Commission does not have the statutory authority to issue these proposed Trade Regulation Rules.

Second, that in terms of policy, the tobacco industry should be permitted as lawful self regulation to pursue the advertising guidelines, now under development, to which I shall later refer.

Third, that in the area of smoking and health, the broad spectrum of Federal Government, State Government, and

private interests concerned, requires that any additional specific regulation should be developed by the Congress.

It needs no elaboration that the tobacco industry has been and is profoundly aware of its responsibilities in this widely publicized area of tobacco and health. For more than a decade, specifically since statistical association studies were made public in 1954, the industry has made available research grants to qualified scientists and institutions, grants with no strings attached, aggregating many millions of dollars, for research into smoking and health.

Since the issuance of the Report of the Advisory Committee to the Surgeon General, cigarette manufacturers have undertaken to support, by additional contributions aggregating ten millions of dollars, further independent research into these questions by the American Medical Association Education and Research Foundation.

The tobacco industry is convinced that massive further research is essential because to date no definitive answers to many basic questions are as yet available.

In the view of the tobacco industry, this hearing offers neither the appropriate forum nor the occasion for technical medical analysis and discussion of the Advisory Committee report, or of detailed technical presentation of the view of those in the scientific community who assert that the criteria employed are not adequate and rest upon individual judgments which are not shared by other medical authorities.

It is a fact that the Advisory Report has been issued. Neither The Tobacco Institute nor in all likelihood the Commission would claim medical competence to discuss the detailed contents of that Report at this hearing.

There are, however, certain other basic non-medical facts and issues of policy that cannot be challenged.

The first is that what was stated in the Report of the Advisory Committee, and most certainly the over-all conclusions arrived at by the individuals comprising it, has been widely, extensively, and intensively publicized throughout the land. The release of the Advisory Report was one of the most thoroughly publicized news events of recent years. Its contents have been summarized, discussed, debated, and commented upon

indicate that consideration of this entire area was to proceed in two consecutive phases: Phase I envisaged preparation of a Report to the Surgeon General by the Advisory Committee covering not only "tobacco but all other factors which may be involved." Phase II was to encompass full and deliberate examination by all interested parties and by all branches of the Federal Government.

At his Press Conference on March 7, 1964, President Johnson confirmed his understanding that this Phase II procedure would be followed.

Wholly apart from the basic legal question, later examined in this Statement, as to whether the Federal Trade Commission has been given the power by Congress to legislate by issuing substantive rules and regulations, the tobacco industry is convinced that the issues with which these proposed Commission Trade Regulation Rules--published a week following the release of the Advisory Report--seek to deal, should be resolved by the Congress of the United States and not by any single administrative agency. The Commission is certainly aware of the widespread Congressional interest and of the variety of legislative proposals that have already been introduced.

On a problem of this magnitude, affecting so many wide-ranging social and economic interests, it is respectfully submitted, at the very outset, that the considerations of policy and discretion, specified in the Commission's own Rule 1.67(d), dictate that whatever regulation may be deemed to be in the public interest should be developed and provided by the Congress.

Turning next to the Notice, the suggested bases for Commission action, and the Trade Regulation Rules proposed, The Tobacco Institute respectfully submits, first, that the Commission is without statutory power to issue the type of substantive

Rules 2 and 3 would be as plain an assertion of legislative power as is Rule 1.

Another Commissioner has stated that a Trade Regulation Rule when issued would not be a "law in any sense" and that it would always be open in a future Commission proceeding to argue that the Rule is unauthorized.

On the other hand, the Notice recites word for word the provisions of Section 1.63(c) of the Commission's General Rules which specifies that once the Rule is promulgated the

> "Commission may rely upon the rule . . . provided that the respondent shall have been given a fair hearing on the legality and propriety of applying the rule to a particular case."

What is meant by a "fair hearing" on the "legality and propriety of applying" a Trade Regulation Rule, we simply do not know.

As to Rule 1 in its application to the future labeling of all packages of cigarettes and as to its future application to every advertisement for cigarettes--no matter what the advertisement says or in what media it appears--it is difficult to escape the conclusion that what is here intended is that any question as to the substantive validity of the Rule is wholly to be foreclosed.

As to some parts of Rule 2, as will be later detailed, what is specified is an ambiguous statutory gloss--or virtual writing into the Act--of certain prohibitions. Whether or not these are sufficiently clear or practicable of compliance, it

appears once again that the apparent intention is to prohibit any examination into the legality and propriety of their substance in any future proceeding.

In our view, it seems clear that the Commission is here plainly attempting to legislate substantive Rules. We respectfully submit that it has no authority to do so.

The Federal Trade Commission Act nowhere grants that authority. The published notice refers merely to the entire statute. Section 5(b) of the Federal Trade Commission Act makes it clear that the Commission in exercising its jurisdiction is to utilize a "proceeding by it" against a particular respondent. That proceeding has for 50 years been predicated upon a complaint, upon testimony, and upon findings of fact by the Commission supported by evidence adduced at the hearing, all now subject to the further procedural safeguards of a fair hearing provided by the Administrative Procedure Act.

Prior to the issuance in June, 1962, of what is now Section 1.63 of the Revised Commission Procedures, it had never been asserted that the Commission had the power to legislate in advance what would be a violation of Section 5(a), as an unfair or deceptive practice, wholly absent a complaint, evidence, and findings in a specific proceeding.

In the Manco Watch Strap proceeding, Docket 7785, decided in March 1962, three Commissioners, in an admitted dictum, announced that in future cases involving goods of foreign origin, there might be employed a rebuttable presumption that as to certain products a substantial segment of the buying public had a preference for American-made products.

In doing so, however, it is important to note that the Commission announced that it was dealing with its "fact-finding function" in particular proceedings. It was not legislating. The Commission itself made clear that it was merely generalizing "the facts established by the Commission in a long line of foreign-origin cases" and added that

> "It is worth restating that these conclusions rest not upon an a priori theory but upon experience reflected in countless records and proceedings."

As the Commission put it, it was merely taking judicial notice of its own records in hundreds of earlier cases involving the same issue of fact in order to establish a rebuttable presumption.

Even so, in Manco, two Commissioners dissented on the ground that the Commission had the power to reach its conclusions only in a particular adversary proceeding and that it could not establish substantive rules in disregard of the statutory procedural safeguards.

In short, we respectfully submit that never up to this time has the Commission asserted that it had the power to promulgate in advance substantive rules that would be completely controlling in the enforcement of the Federal Trade Commission Act.

The legislative history of the Federal Trade Commission Act makes it abundantly clear not only that the Commission does not have the power, but also that Congress specifically was asked to grant it and repeatedly refused to do so.

As this Commission of course knows, the original House form of the bill in 1914 would have created a Commission vested with only investigatory powers. It was as part of that

proposal that the authority was included to make rules and regulations and to make classifications of corporations for carrying out the provisions of the statute.(H.R. 15613, 63rd Cong., 2d Sess., April 13, 1914, Sec. 8, p. 6)

While the measure in its original form was before the House Interstate and Foreign Commerce Committee, one Congressman urged that a section be added giving the Commission power

> "to make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition . . .."

The rejection of this suggestion led to a dissent in a Minority Report. (See H. Rep. 533, 63rd Cong., 2d Sess., Part 3, April 20, 1914, p. 21)

Moreover, during the floor debates on the House bill, the House twice rejected amendments which would have explicitly conferred upon the Commission power to promulgate substantive rules. (51 Cong. Rec. 9047, 9049-50, 9056-57)

The Senate added the prohibition of unfair methods of competition to be determined in specific quasi-judicial proceedings after complaint and hearings, and based upon findings.

As is well-known, the Conference Committee adopted and amplified the Senate concept of authorizing the Commission to institute specific proceedings. It authorized the Commission to issue a complaint, to make findings of fact, supported by testimony adduced at a hearing, and thereafter to enter a cease and desist order in a particular proceeding.

When this Conference Committee version in turn was debated, it was made perfectly clear that this quasi-judicial

authority was to be distinguished from the power to issue substantive rules. It was stated by Judge Covington, a leading member of the Conference Committee, specifically that

> "The Federal Trade Commission will have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature." (51 Cong. Rec. 14932, Sept. 10, 1914)

As put by another Congressman, Mr. Sherley, the Commission was to exercise

> "in no sense a legislative function such as is exercised by the Interstate Commerce Commission." (51 Cong. Rec. 14938, Sept. 10, 1914)

In addition, the debates confirmed that whatever the Commission did it was to do by an order in a specific proceeding after complaint, hearings, and on findings of fact. (51 Cong. Rec. 14928, Sept. 10, 1914)

In the face of this explicit legislative history, it can hardly be contended that the Federal Trade Commission has the power, as here asserted, to issue in advance substantive rules applicable across an entire industry.

Where Congress intended to authorize the issuance of substantive rules, it has always plainly done so as it did in Section 6(a) of the Wool Products Labeling Act of 1939, in Section 8(b) of the Fur Products Labeling Act of 1951, and in Section 5(c) of the Flammable Fabrics Act of June, 1953.

The legislative history likewise makes clear that the Commission cannot rely upon Section 6(g) of the Federal Trade Commission Act to claim the authority to issue substantive regulations. To do so would plainly be in conflict with the provisions of Section 5.

The judicial decisions, in which some other agencies have under particular circumstances been accorded under their governing statutes the authority to issue substantive rules are plainly distinguishable for a variety of reasons. They concerned different regulatory provisions under different statutes, with wholly different legislative histories, involving comprehensive regulation in particular industries.

It is indeed striking that if the substantive legislative power now sought to be asserted in these proposed Trade Regulation Rules had existed for almost 50 years, no previously constituted Federal Trade Commission, or its staff, ever before found that authority in the statute or sought to exercise it.

In addition, the recent introduction of bills in Congress to grant in various forms the very power the Commission suggests it has always had, is persuasive evidence that the sponsors of these measures do not believe that the Commission ever had been given the power to issue binding substantive Trade Regulation Rules.

There is little need to elaborate the point that if the Commission is permitted to legislate by Trade Regulation Rules in the manner here proposed, virtually every procedural safeguard in the Federal Trade Commission Act and in the Administrative Procedure Act is destroyed. Congress would not have provided these safeguards for enforcement by administrative action in particular proceedings if at the same time it was conferring power to issue substantive rules applicable across an entire industry.

It is true that in the enforcement of the Federal Trade Commission Act, the Commission has appropriately endeavored to

issue helpful guidance on an industry-wide basis to promote voluntary compliance with the law.

The tobacco industry believes that those efforts have been lawful, desirable, and productive. It believes that the issuance of advisory Trade Practice Rules--as distinguished from the substantive Trade Regulation Rules here proposed--and the issuance of what have been called Guides are helpful in securing voluntary compliance with both the Federal Trade Commission Act and the Clayton Act.

Since the issuance of the Report of the Advisory Committee on January 11, 1964, the tobacco industry has been intensively engaged in the development of guidelines for cigarette advertising responsive to the widespread publicity given that report and the wide public interest in it. The subjects being worked on in the formulation of these new guidelines include those within the Commission's statutory jurisdiction for enforcement under Section 5 of the Act as well as other subjects that fall within the area of lawful industry self-regulation. When these advertising guidelines are crystallized, they will of course be discussed with the Federal Trade Commission and with other interested departments of the Federal Government.

Accordingly, apart from the question of the plain lack of the power to legislate and the absence of any statutory authority to issue substantive rules, the issue before the Commission in terms of policy may be viewed in terms of basic good government. The Commission has repeatedly expressed its view that insofar as practicable, voluntary industry action to deal with problems affecting the public interest is preferable.

Paramountly, where an issue concerns so many agencies of Government, the determination of any additional specific regulation should be made by the Congress. The problem of cigarette

smoking and health is of concern to many Federal agencies: to the Department of Health, Education and Welfare; to the Department of Agriculture; to the Treasury Department; to the Commerce Department; and to other state and Federal agencies. The proposed Trade Regulation Rules here involved are of concern not only to cigarette manufacturers, but also to the entire mass media industry. Wise resolution of the problem affects farmers, labor unions, wholesale distributors, and retail merchants. As a source of revenue, tobacco products are central to the economy of many states. The livelihood of millions of Americans is also involved.

The public interest in the problem of smoking and health is not minimized or disregarded in this view, held by many, that all of the interests concerned ought to be broadly dealt with by the Congress.

In short, apart from the basic legal issue of the Commission's authority--which ultimately only the courts can resolve--policy and discretion combine to dictate comprehensive Congressional consideration and not Commission mandatory action.

Turning to the text of the proposed Rules, The Tobacco Institute respectfully offers a number of general observations, without in any way conceding the jurisdiction of the Commission to issue substantive rules.

As an association, the Institute may not with propriety discuss the specific advertising of any particular brand of cigarette or the comparative characteristics of the various brands manufactured by individual companies.

As to Rule 1, there is no question as to what it means. Every package of cigarettes--whether advertised or not--must carry the prescribed Caution labeling. Every advertisement, no matter what it says, must likewise include the prescribed Caution.

Even an advertisement that simply refers to the "X brand"--or a television advertisement that merely states that "This Program was brought to you by the makers of 'X Brand' cigarettes"--must include one or the other of the Cautions specified.

Why?

The asserted basis for Rule 1 can be found only in a series of Commission "beliefs" that are set forth in the Notice.

It is first stated that the Commission has reason to believe that much current cigarette advertising

> "may prevent or hinder large numbers of consumers from recognizing and appreciating the nature and extent of the substantial health hazard of cigarette smoking."

The Notice makes clear that this over-all belief rests on two further "beliefs", which the Notice denominates as its specific bases.

These are:

> "First, [as set forth in the Notice,] the Commission has reason to believe that many current advertisements falsely state, or give the false impression, that cigarette smoking promotes health or physical well-being or is not a health hazard, or that smoking the advertised brand is less of a health hazard than smoking other brands of cigarettes.
>
> "Second, [again according to the Notice,] the Commission has reason to believe that much current advertising . . . may create a psychological and social barrier to the consuming public's understanding and appreciation of the gravity of the risks to life and health involved in cigarette smoking."

Of course, these asserted beliefs are not predicated, as required by Section 5 of the Act and the Administrative Procedure Act, upon evidence adduced in any proceeding, under even the vaguest rules of evidence, or that has been subject at any time to cross-examination. Nor are they presented as findings based on substantial evidence in any statutory proceeding.

Moreover, it is difficult to relate certain of the stated beliefs even remotely to the problem of smoking and health, with which the Commission purports to deal. An advertisement

that suggests or portrays that cigarette smoking is "pleasurable," would, standing alone, hardly be an unfair or deceptive practice.

Fundamentally, however, the Commission's asserted beliefs boil down to what it says it is concerned about in cigarette advertising.

The first suggestion is that it believes that some current advertising is falsely representing or concealing the health hazards of smoking. This sweeping charge has not been established under the required statutory procedures.

If any false or misleading advertisements are being disseminated, it is of course appropriate for the Commission to proceed against those advertisements. It is not appropriate for the Commission to use a broad-axe approach--or to attempt to impose sweeping substantive restrictions on all cigarette advertising and labeling --on the basis of its belief about some violations of law.

The second asserted belief, offered as the basis for these Rules, is the Commission belief that cigarette advertising "may create a psychological and social barrier to the consuming public's understanding and appreciation" of the possible health risks in smoking.

Once again, that belief is not predicated upon any findings based on evidence, subject to cross-examination, adduced in an administrative hearing.

Indeed, to the best of our knowledge, this is a wholly new theory of advertising law that has never been applied by the Commission and most certainly has never been approved by any court. It is one thing for an advertiser to make a false claim about his product, whether that falsity lies in what he says or in what he fails to say. It is a wholly different thing to suggest that advertising in and of itself may cause the consumer momentarily to forget

what every consumer knows. The possibility of fairly administering a law based on that concept has disturbing implications.

The phrase "a psychological and social barrier," has an impressive and contemporary ring. But what in the world does it mean? An advertisement showing an individual smoking a cigarette in any setting may suggest the pleasures of smoking rather than the asserted risks. But to predicate administrative action on the notion that this creates "a psychological and social barrier" to understanding and appreciating the widespread agitation about smoking and health, is to attempt substantive regulatory action based on surmise and a refusal to examine into the facts and the extent of public understanding.

As we have already noted, the charges against smoking are as widely reported and discussed as any health problem of the day. We do not believe the American people, whether as a result of cigarette advertising or any other phenomenon, are prevented by "psychological and social barriers," or any other kind of barriers, from knowing about and evaluating those charges.

In addition, the proposed Rule 1 flies in the face of a fundamental concept that the Commission has developed in its own advertising and labeling decisions.

In determining in a specific proceeding on a particular advertisement whether any claim made in an advertisement is misleading or deceptive -- let alone in fashioning an attempted specific affirmative labeling and advertising requirement for an entire industry -- it is settled that the Commission will consider the background information and understanding, and indeed the prejudices, that persons reading or viewing the label or advertisement bring to it.

That is the teaching of the Manco Watch Strap case to which we have referred. There, the background on public understanding had been examined and developed in scores of prior specific Commission proceedings. It is also the teaching of the Reused Lubricating Oil cases.

Can it reasonably be asserted that the American public lacks knowledge about the subject of smoking and health?

No question has received more public attention. Both in scientific and popular media -- this issue had been talked about more often than any other medical question in this century. For more than ten years there has been -- in newspapers, in magazines, on television and from other sources -- an almost steady stream of reports asserting some linkage of cigarette smoking with various diseases, principally lung cancer.

Two years ago that barrage of news, stories, and editorial comment reached a new pitch with the publication of an English report. Two months ago the release of the Report of the Surgeon General's Advisory Committee caused it to reach a virtual crescendo.

Against the consuming public's continued exposure to and appreciation of a question that has been so extensively brought to that public's attention, the Commission's a priori beliefs about some advertising creating a "psychological and social barrier" could not support a finding in a specific proceeding. Even more, it cannot be accepted as a predicate for these attempted substantive rules -- particularly for Rule 1.

If the Commission may act on this assertion of belief, then an administrative agency may, on the same kind of asserted beliefs and without adduced proof, issue a substantive regulation requiring explicit warnings on alcoholic beverages as to the health

hazards of drinking and on all advertisements for butter and other dairy products because of asserted fears about cholesterol and saturated fats.

On the same reasoning, it could equally require a cautionary warning in every automobile advertisement, reminding purchasers of the increasing high incidence of motoring accidents -- or in any advertisement for any type of land or air travel of the ever present possibility of casualty -- lest the public be led to forget that these may occur.

The fact is: Consumers know that health charges have been made against dairy products; they know that airplanes as well as automobiles sometimes crash; they know that health charges have been made against cigarette smoking.

In view of that knowledge, there is no deception in a cigarette label or advertisement merely because it fails to recite the charges that have been made against smoking. An affirmative statement can be required only to prevent deception.

Given the background knowledge that every American smoker already has with respect to the possible health consequences of smoking, there is no basis for requiring such recitals.

In our view, it has not been established that every cigarette label or every cigarette advertisement -- even those that make no claims whatever -- must carry one of the Cautions specified in Rule 1 in order to obtain public consciousness of the asserted problems of smoking and health.

The asserted belief that it is necessary to do so both disregards the facts about the extensive and continued publicity of the health problem and denigrates the intelligence of the American consumer.

If a cigarette manufacturer merely advertises that his brand embodies a filter, is that claim standing alone a comparative claim of lesser hazard?

Even more ambiguity and difficulty arises with the attempted exception. We appreciate that here the Commission is endeavoring to be responsive to various suggestions that advertisements ought to be permitted to refer to characteristics of a particular brand of cigarettes.

But it is difficult to determine the application of the exception because no one can tell what is meant by a "specific" claim as to "health consequences."

Finally, difficulty will be encountered in determining what the reference to "all facts" in subdivision (2) of Section (c) is to mean in the light of some of the examples given.

Insofar as these ambiguities reside in Rule 2, particularly in subdivision (c), they contribute little in the way of specificity to Section 5(a) of the Act.

If the examples given under Rule 2 are combined with that given under Rule 3, it is difficult to envisage any form of advertisement, other than mere mention of a brand, that might not be subject to challenge.

Combined with the Cautions proposed to be required under Rule 1, the end result sought appears to be to foreclose virtually every form of cigarette advertising that shows anything in the video or in pictorial form or makes any statement whatever beyond the required Caution.

Turning to Rule 3, the tobacco industry believes that when statements as to the quantity of any particular smoke ingredients are made, it would be in the public interest to have the represented quantities established by uniform and reliable testing procedures.

There are, however, two problems inherent in the proposed Rule 3. As it reads, it suggests that no advertising statement as to the quantity of any smoke ingredient may be made until the Federal Trade Commission has approved a particular testing procedure uniformly to be employed. This would permit prohibition by inaction. We do not believe that a truthful claim can be prohibited unless and until the Commission gets around to approving some method as being a reliable and uniform test.

The second objection runs deeper. We respectfully suggest that the Federal Trade Commission is not an appropriate agency to develop techniques for the scientific measurement of cigarette smoke ingredients.

We believe that the Commission will agree that this authority should be conferred upon some other agency of the Federal Government, such as the Bureau of Standards, which is fully staffed with competent scientific personnel who have adequate laboratory facilities available to them. Moreover, some appropriate procedure should be provided for the reception of objections, their technical evaluation, and insofar as practicable some type of judicial review.

The present hearing does not appear to be an appropriate forum for the discussion of what are proper techniques for the sensitive scientific measurements of the quantity of the particular ingredients of cigarette smoke.

Accordingly, The Tobacco Institute respectfully submits that the Federal Trade Commission is lacking in the statutory power to promulgate these Trade Regulation Rules because Congress has not delegated that power to legislate to the Commission.

It is the view of the tobacco industry that all of the ramifications of the subject of smoking and health -- and the determination of what should be done about it -- rest with Congress. Wholly apart from any differences that may exist as to the law or the facts, sound public policy would dictate that course.

The Tobacco Institute and its members appreciate this opportunity to submit these views to the Commission.